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No. 95-1830

In the

Supreme Court of the United States

October Term, 1995

JAMES GOMEZ, Director, California Department of Corrections; and ARTHUR CALDERON, Warden,
Petitioners,

v.

DAVID FIERRO and ALEJANDRO GILBERT RUIZ,
Respondents.

**Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**MOTION TO FILE BRIEF AMICUS CURIAE AND
BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached brief amicus curiae in support of petitioners James Gomez and Arthur Calderon. Consent to the filing of this brief has been granted by counsel for petitioners and has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondents David Fierro and Alejandro Gilbert Ruiz, thereby necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt charitable corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has nearly 25,000 supporters throughout the United States. PLF maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

PLF attorneys have been following the case at bar closely since its inception in the United States District Court for the Northern District of California. PLF filed a brief amicus curiae in support of petitioners James Gomez and Arthur Calderon with the United States Court of Appeals for the Ninth Circuit.

PLF seeks to augment the arguments in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of federalism and the

separation of powers will provide an additional viewpoint with respect to the constitutional issues presented. PLF's brief will analyze the clear and direct conflict between the Ninth Circuit's decision in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), and decisions issued by the Fourth Circuit, *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995), and the Fifth Circuit, *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983), as well as numerous state courts all upholding the use of lethal gas against Eighth Amendment challenges. Additionally, PLF's brief will address the important question of the proper standard for evaluating Eighth Amendment challenges to particular modes of punishment.

For the foregoing reasons, PLF respectfully requests that its motion to file the brief amicus curiae, submitted concurrently with this motion, be granted.

DATED: June ___, 1996.

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QUESTIONS PRESENTED FOR REVIEW

Does a state's method of execution by lethal gas violate the Eighth Amendment because there is a risk that condemned inmates may not be rendered immediately unconscious and may experience some pain?

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS
JAMES GOMEZ AND ARTHUR CALDERON**

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996) (*Fierro II*). That opinion affirms the order of the District Court granting declaratory and

injunctive relief, which is reported at *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994) (*Fierro I*).

STATEMENT OF THE CASE

The California State Legislature has enacted a statute which selects the methods of execution for convicted capital criminals such as the respondents in this case. California Penal Code § 3604 allows condemned death row inmates the opportunity to elect to have their punishment imposed by lethal gas or intravenous injection. If the inmate does not choose a method of execution, then the default method of execution is by lethal gas.

Respondents have been sentenced to death under the laws of California, and currently reside on death row in San Quentin State Prison, California. Having exhausted their stayed appeals, respondents filed a complaint challenging the constitutionality of California's method of execution by lethal gas. After a trial, United States District Judge Marilyn Hall Patel found for the condemned inmates and declared execution by lethal gas under California Penal Code § 3604 in violation of the Eighth Amendment's prohibition of cruel and unusual punishments. Also, the court permanently enjoined petitioners from administering lethal gas to execute respondents or any other death row inmate. *Fierro I*, 865 F. Supp. at 1415.

An appeal followed in which the Ninth Circuit Court of Appeals affirmed the decision of the trial court. *Fierro II*, 77 F.3d 301. In its recitation of the facts, the Court of Appeals found the District Court's factual findings regarding pain were sufficient to support its holding that lethal gas is an unconstitutional method of execution. *Fierro II*, 77 F.3d at 308. Specifically, the Court of Appeals found that inmates "probably retain consciousness anywhere from 15 seconds to

one minute," *id.* (quoting *Fierro I*, 865 F. Supp. at 1404), then stated later "that there exists a substantial risk that this pain will last for several minutes," *Fierro II*, 77 F.3d at 308. The appeals court further reasoned that given this evidence of pain, analysis of legislative trends is unnecessary. *Id.*

SUMMARY OF ARGUMENT

This is a case about judicial activism and abuse. The Ninth Circuit Court of Appeals decision in *Fierro II* declaring lethal gas unconstitutional *directly conflicts* with the Fourth Circuit, *Hunt v. Nush*, 57 F.3d 1327 (4th Cir. 1995), the Fifth Circuit, *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983), and numerous state courts (including California), all of which have directly addressed the constitutionality of lethal gas under the Eighth Amendment and found the procedure constitutional.

Also, the decision in *Fierro* conflicts with this Court's death penalty jurisprudence. This Court has clearly held that Eighth Amendment challenges must be analyzed by viewing objective factors, and that punishments are cruel and unusual only if they involve torture or a lingering death and are inhuman and barbarous. The proper Eighth Amendment standard is whether a particular method of punishment involves the unnecessary and wanton infliction of pain.

The Ninth Circuit in *Fierro II* did not apply these standards properly. Neither the objective evidence nor expert testimony presented in *Fierro I* was conclusive enough to demonstrate that the mode of punishment was cruel and unusual under the Eighth Amendment. The Ninth Circuit eschewed analysis of legislative trends, reasoning that the evidence of pain--which the trial court itself doubted--was enough to enjoin the method of execution.

This Court should act to resolve these conflicts between the circuits over one of the most important issues of our time: the punishment and deterrence of crime.

REASONS FOR GRANTING THE PETITION

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A DIRECT CONFLICT BETWEEN THE CIRCUITS AS WELL AS BETWEEN THE NINTH CIRCUIT AND NUMEROUS STATE SUPREME COURTS

A. The Ninth Circuit Decision Directly Conflicts with the Fourth and Fifth Circuits Regarding the Constitutionality of the Lethal Gas Method of Execution

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. "Punishments are cruel when they involve torture or a lingering death" *In re Kemmler*, 136 U.S. 436, 447 (1890). "Cruel" means "something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* The standard under the Eighth Amendment is whether a particular method of punishment involves "the unnecessary and wanton infliction of pain." *Campbell v. Wood*, 18 F.3d 662, 683 (9th Cir. 1994) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)).

The Ninth Circuit failed to apply properly the above standards. Indeed, the Ninth Circuit opinion in *Fierro II* does not apply the proper legal standard of "wanton and

"unnecessary infliction of pain," instead holding essentially that any pain is sufficient to invalidate the method.

In reviewing the factual findings of the trial court, the Ninth Circuit reasoned as follows: (1) the inmate remains conscious between 15 seconds and 1 minute after the first breath of lethal gas; (2) there is a substantial risk that consciousness may persist for several minutes; (3) the inmate is likely to feel pain during consciousness; and (4) death by lethal gas is similar to asphyxiation. *Fierro II*, 77 F.3d at 308 (citing *Fierro I*, 865 F. Supp. at 1413). As discussed below, the Ninth Circuit decision is directly in conflict with *Hunt v. Nuth*, 57 F.3d at 1337-38, which upholds the lethal gas method of execution against a functionally identical Eighth Amendment challenge.

In *Hunt v. Nuth*, the Fourth Circuit specifically mentions *Fierro I* and specifically disapproves of the reasoning in that case, stating that "[l]ethal gas currently may not be the most humane method of execution--assuming that there could be a humane method of execution--but the existence and adoption of more humane methods does not automatically render a contested method cruel and unusual." *Hunt v. Nuth*, 57 F.3d at 1337-38.

The *Hunt* court had an opportunity to consider some of the same evidence proffered in the *Fierro* case, since the same witness declarations were recycled for the multiple challenges to execution by lethal gas. *Hunt v. Smith*, 865 F. Supp. 251, 260 (D. Md. 1994). In *Hunt*, the Fourth Circuit "agree[d] with the district court in Hunt's case that 'graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain.'" *Hunt v. Nuth*, 57 F.3d at 1338 (quoting *Hunt v. Smith*, 856 F. Supp. at 260).

The lower court in *Hunt v. Smith*, 856 F. Supp. at 260, rejected the "affidavits submitted by petitioner [which] have the look of having been recycled from a 1992 California case [*Fierro I*]." Even the Ninth Circuit recognized the direct conflict with *Hunt*, but attempted to distinguish the case factually by stating that the Fourth Circuit did not have the benefit of official records that set forth in detail what occurred in the chamber during an execution. *Fierro II*, 77 F.3d at 309. The Ninth Circuit did not mention, however, that the *Hunt* trial court viewed some of the same evidence submitted at trial in *Fierro*, as explained above.

The lower court in *Fierro I* even had doubts when it viewed this evidence, stating that the accounts and studies presented at trial were "far from conclusive." *Fierro I*, 865 F. Supp. at 1398. Furthermore, "[t]he scientific literature cannot answer the key question in this action: which effects are felt first, and whether unconsciousness sets in quickly under the conditions present in the San Quentin gas chamber." *Id.* at 1399. The observations of past executions are "difficult to interpret." *Id.* at 1400. This is precisely why the trial court in *Fierro I* turned to the constitutionally shaky "evolving standards of decency" rationale as a basis for striking down the lethal gas method. *Fierro I*, 865 F. Supp. at 1409. The Ninth Circuit did not consider this rationale and thought "that there was no need for the district court to engage in analysis of legislative trends." *Fierro II*, 77 F.3d at 308. The Ninth Circuit therefore bases its entire decision on the same evidence *deemed insufficient* by the trial court and rejected by the Fourth Circuit. The Ninth Circuit also failed to subject the pain evidence to the "wanton and unnecessary infliction of pain" standard the Fourth Circuit properly applied.

Moreover, the *Fierro* decision is in direct conflict with the Fifth Circuit decision in *Gray v. Lucas*, 710 F.2d at 1060-61, which upholds the use of lethal gas against an Eighth Amendment challenge. In upholding the use of the lethal gas procedure, the Fifth Circuit held:

[W]e are not persuaded that under the present jurisprudential standards the showing made by Gray justifies this intermediate appellate court holding that, as a matter of law or fact, the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right.

Gray v. Lucas, 710 F.2d at 1061. Again, the Ninth Circuit recognized its conflict with *Gray*, but distinguished that case because the *Gray* court did not have extensive expert witness testimony or prison medical records on gas chamber executions. While the trial court found this evidence was indecisive in *Fierro I*, the Ninth Circuit placed heavy reliance on it.

The issue before this Court implicates one of the predominant concerns of the American people: proper punishment and effective deterrence of violent criminals. The conflict that exists between the Ninth Circuit and the Fourth and Fifth Circuits on this important issue is clear and significant. Only this Court can resolve this plain conflict and set forth explicit constitutional rationale for states to determine the method of execution.

B. The Ninth Circuit Decision Directly Conflicts with Numerous State Court Decisions Regarding the Constitutionality of the Lethal Gas Method of Execution

In addition to the Fourth and Fifth Circuits, every state Supreme Court that has addressed the question of whether lethal gas is cruel and unusual under the Eighth Amendment has upheld the lethal gas procedure against constitutional challenge. This includes the California Supreme Court, twice. *In re Anderson*, 69 Cal. 2d 613, 631-32 (1968) (California's lethal gas method of execution upheld against an Eighth Amendment challenge; courts must give deference to California Legislature regarding choice of punishment for crime), *cert. denied*, 406 U.S. 971 (1972); *People v. Daugherty*, 40 Cal. 2d 876, 894 (lethal gas upheld), *cert. denied*, 346 U.S. 880 (1953). Other states have upheld the procedure as well. E.g., *Billiot v. State*, 454 So. 2d 445, 464 (Miss. 1984) (Mississippi lethal gas method upheld), *cert. denied*, 469 U.S. 1230 (1985); *Calhoun v. State*, 468 A.2d 45, 69-70 (Md. 1983) (Maryland lethal gas method upheld), *cert. denied*, 466 U.S. 993 (1984); *State v. Maloney*, 464 P.2d 793, 805 (Ariz. 1970) (Arizona lethal gas method upheld); *Duisen v. State*, 441 S.W.2d 688, 693 (Mo. 1969), modified by *Furman v. Georgia*, 408 U.S. 238 (1972) (Missouri lethal gas upheld).

In fact, until *Fierro I*, no court had ever invalidated the lethal gas method on any grounds. The eccentric decision in *Fierro II* throws the method of execution into great turmoil. Only this Court can restore harmony to this newly chaotic area of the law.

The Ninth Circuit's decision in *Fierro II* now creates a real and resolvable conflict regarding the constitutionality of lethal gas. This Court can and should resolve

conclusively and swiftly whether individual states may employ lethal gas in executing convicted capital criminals.

The conflict regarding this issue becomes even more weighty with the rising cost of the criminal justice system, as well as the death penalty appeals process. This issue directly affects the people's ability to select the best methods of deterrence and punishment. Crime is a highly significant issue for Americans today, and the uncertainty regarding the people's ability to select the preferred methods of administering criminal punishment must be resolved by this Court.

II

**THE EIGHTH AMENDMENT
AND THE PRINCIPLES OF
FEDERALISM AND SEPARATION
OF POWERS UNDER THE UNITED
STATES CONSTITUTION REQUIRE THAT
FEDERAL COURTS RESPECT
LEGISLATIVE DETERMINATIONS OF THE
STATES ON APPROPRIATE METHODS OF
PUNISHMENT FOR CRIMINAL CONDUCT**

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII (emphasis added). "The Supreme Court has rarely, however, addressed whether particular methods of execution employed in this country are unconstitutionally cruel." *Campbell v. Wood*, 18 F.3d at 681.

Instead, Eighth Amendment jurisprudence is concerned with the proportionality of the punishment to the crime committed. *Coker v. Georgia*, 433 U.S. 584, 592

(1977) (death penalty for rape grossly disproportionate to crime committed); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (citing *Weems v. United States*, 217 U.S. 349, 371 (1910)) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)) (Eighth Amendment directed ""against all punishments which by their excessive length or severity are greatly disproportionate to the offense charged"").

The Eighth Amendment inquiry focuses on the individual crime. *Coker*, 433 U.S. at 599. The Court will "insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" *Enmund v. Florida*, 458 U.S. at 798 (death penalty for felony murder constitutional) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

As for the individual criminals who originally brought this challenge to the lethal gas method of execution, their brutal crimes are relevant to the individualized consideration required under *Enmund, supra*. Respondent David Rey Fierro's despicable actions are outlined in *People v. Fierro*, 1 Cal. 4th 173, 200 (1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 303, *reh'g denied*, ___ U.S. ___, 113 S. Ct. 679 (1992). In a robbery, Fierro fatally shot small grocery store owner Sam Allessie point blank in his chest twice while his wife watched the murder. 1 Cal. 4th at 201-02.

Respondent Alejandro Gilbert Ruiz murdered two of his wives, Tanya and Pauline, and his stepson Tony. *People v. Ruiz*, 44 Cal. 3d 589, 599-603, *cert. denied*, 488 U.S. 871 (1988), *reh'g denied*, 493 U.S. 948 (1989). The killer had eluded prosecution for the first murder for four years.

Robert Alton Harris was previously a named plaintiff in this case before being executed by lethal gas on April 21, 1992. *Fierro I*, 865 F. Supp. at 1390. Harris kidnapped, robbed, and murdered John Mayeski and Michael Baker, two teenage boys, while stealing the boys' car to perform a bank robbery in San Diego County. *People v. Harris*, 28 Cal. 3d 935, 943-45, *cert. denied*, 454 U.S. 882 (1981). While preparing for the robbery the next day, Harris laughed and giggled about shooting the boys, showing no remorse. 28 Cal. 3d at 945. In a prior case, James Wheeler's widow and niece testified that Harris, "without provocation, beat Wheeler to death while mockingly claiming to teach his victim self-defense. During this sadistic attack [Harris] also cut off Wheeler's hair and threw matches at him after squirting him with lighter fluid." *Id.* at 946.

The California Legislature has selected the punishment for individual criminals convicted of capital offenses such as Fierro, Ruiz, and Harris and that method of punishment is *presumed* valid. *Gregg v. Georgia*, 428 U.S. at 175 (plurality opinion); *Campbell*, 18 F.3d at 682. The Ninth Circuit did not apply this presumption in *Fierro*, nor even mention the presumption in the opinion.

The California Legislature has broad discretion to determine crimes and prescribe punishments. In *In re Anderson, supra*, the California Supreme Court upheld the use of lethal gas against an Eighth Amendment challenge:

The fixing of penalties for crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion, and the courts will not interfere therewith unless the penalty

prescribed is *clearly and manifestly cruel and unusual.*

69 Cal. 2d at 630-31 (emphasis added) (citing *People v. Tanner*, 3 Cal. 2d 279, 298 (1935); *People v. Keller*, 245 Cal. App. 2d 711, 714-15 (1966)).

Presently, the people's confidence in our Nation's criminal justice system is unfortunately--but justifiably--too low. The people must have the ability to impose suitable penalties on those who run afoul of our laws and harm innocent people, particularly those heinous criminal affronts that demand the capital sanction. When free people are rendered incapable of proper retribution through government, the people may take matters into their own hands to the detriment of all. The Ninth Circuit's decision opens the door to a world where the people lose control over methods of punishing criminal behavior. The federal judiciary should not substitute its policy judgment for that of the people and their elected representatives.

CONCLUSION

This Court can and should resolve the clear and significant conflict between the Ninth Circuit on the one hand, and the Fourth and Fifth Circuits and numerous state courts on the other hand, regarding the constitutionality of the lethal gas method of execution. The punishment and deterrence of crime is one of the most important legal and social issues of our time, and the people are entitled to a uniform and predictable constitutional rule on the legality of particular punishments in this area.

For these reasons, amicus respectfully urges this Court to grant the petition for certiorari in this case and to vindicate the right of the people to govern themselves.

DATED: June, 1996.

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